

PARENTS R. AND Z.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 14-67

OPINION

INTRODUCTION

The Appellants appealed the 10 day suspension and the expulsion (held in abeyance) of their son. The Montgomery County Board of Education (local board) filed a Motion for Summary Affirmance. The Appellants responded. The local board replied.

FACTUAL BACKGROUND

We note that the facts about this suspension are viewed and recounted through the prism of each party's perspective. The Appellants recount that their son was goaded and bullied by Student A over time. They contend on that April 21, 2014, she sprayed mouth freshener in his eye and shortly thereafter kicked him, injuring his leg. Thus, in their view, Student A started the fight and their son lashed out against Student A in his own defense. Thereafter, the Appellants allege harsh interrogation of their son, unfair treatment in the disciplinary process, which resulted in a 10 day suspension and a forced signature to a Code of Conduct contract that, with the threat of expulsion, hung like the sword of Damocles over his head causing him serious continuing anxiety. The Appellants want this Board to expunge the 10 day suspension from their son's record and direct the local board to allow parents to record disciplinary conferences in the future.

The local board recounts that Student B, not Student A, accidentally sprayed Appellants' son in the eye and she apologized for doing so. The local board asserts that Appellants' son struck out at Student A believing she was responsible. He injured her by kicking her, hitting her, throwing her against a fence, chasing her around the playing field, and continuing to lunge again and again at Student A even after a teacher intervened. The local board states that it was the student's mother, not school staff, who yelled at her son during one of the disciplinary conferences causing him to break down and cry.

Facts Related to the Suspension

We have concluded that the local board's and Appellants' recounting are not that far apart. It is undisputed that Appellants' son thought it was Student A who sprayed him in the eye. He admits that he struck Student A and that he chased her around the playing field. (Motion, Ex.

16, Appellants' son's statement). It is undisputed that Student A had scratches and was bleeding as a result of the ensuing altercation with Appellants' son, and that he did not stop his pursuit of Student A around the field even after a teacher intervened.

Those facts are supported by statements from all 9 student witnesses to the event. (Motion, Exs. 5-13) (Eight student witnesses wrote that it was Student B who sprayed Appellants' son, one wrote it was Student A). Two teachers also witnessed the event. One reported that Appellants' son was kicking Student A while she lay on the ground and that, once Student A got up, Appellants' son chased her around the field, continuing to lunge at her even when the teacher got between them. (Motion, Ex. 14). The other teacher saw Appellants' son try to charge towards Student A after the other teacher intervened. She heard him yelling "you always do this" and "you have been doing this for a long time and I'm tired of it." (Motion, Ex. 15).

The day after these events, the principal sent a letter to Appellants informing them that she was suspending their son for ten days starting on April 22, 2014, "for a violent physical attack of a female student..." (Motion, Ex. 18).

Facts Related to the Process That Occurred Thereafter

In the suspension process there were three conferences/meetings. The first occurred with the principal, Ms. Serino, and the Appellants' son within an hour of the incident. Appellants assert that the principal intimidated Appellants' son with a "threat of serious punishment" while telling him that Student A would not be punished. (Appeal at 1). The hearing officer's report sets forth the local board's recounting of the same meeting:

Ms. Serino said she told [Appellants' son] they were concerned he had attacked Student A, and there would be consequences because it was a very serious offense. She stated that she did not tell [him] he would be recommended for expulsion or say Student A would not be punished at that time.

(Motion, Ex. 25 at 2).

A second conference occurred on April 25, 2014 with Ms. Musy, Coordinator, Division of Pupil Services Personnel, MCPS, Appellants and their son, among others. Appellants assert that Ms. Musy was "abusive and intimidating" to Appellants' son, "badgered" him until he cried, did not allow Appellants to speak, and ended the meeting abruptly. (Appeal at 2 & 5).

The Appellants described the meeting this way:

Ms. Musy started the meeting by refusing to allow [our son] sitting [sic] between his parents, so that during her questioning she could move her intimidating face close to the child, yell and scare him. Also, she frequently would not allow [him] to finish speaking,

especially when she did not want to hear certain thing she did not want to. For instance:

- (1) She kept asking why [Student A] kicked [him], which is a question for [Student A] to answer.
- (2) She asked why [Student B] said “sorry”. [He] said it’s because she felt sorry for him when she saw he was in so much pain. Ms. Musy reacted angrily as if she didn’t want to hear this at all.
- (3) After [our son] states [Student A] did not cry during the fight, Ms. Musy kept asking 5-6 times why he mentioned this. When asked the first time, [he] replied: “That’s what happened.” But she kept asking the same question, again and again and again. She was harsh, loud, intimidating and completely unprofessional.

When [our son] was already in tears he could hardly speak, Ms. Musy continued her badgering without any consideration. Her tone and manner were full of hatred toward our family from the moment the meeting started. The more she shouted, the more scared and broken [our son] became.

When things apparently went out of control, [my husband] asked Ms. Musy to watch her manner of talking to a child. Ms. Musy responded by threatening to quit the meeting and send this case to the next level of hearing. Then, [I] said maybe we should do a recording and let Ms. Musy hear her own tone and manner of badgering a child, she immediately declared the meeting was over. Thus, the investigation was not finished, [our son] did not get the chance to finish stating his version of facts, and the meeting was canceled arbitrarily by Ms. Musy.

(Appeal Appendix at 5).

The local board recounts a different set of facts supported by three affidavits. (Motion, Exs. 22-24). Ms. Musy avers:

On April 25, 2014, I was conducting a conference with a student, his parents, and school staff about the student’s attack on a female classmate and the school principal’s decision to suspend the student for 10 days and her recommendation for expulsion.

The student was telling his story. It was my impression that the student and his parents had discussed the events and gone through the story previously, which is not unusual.

As he was telling the story, the student said, the girl did not cry until she went to the teacher. I asked him why he said that and he replied, "You'll see later." It seemed that he planned to address that later in the narrative and my asking when I did threw him off course. I said, "Well tell me now." At that point, the mother erupted. She jumped out of her seat, causing it to fall against the wall, and began screaming. In fact, any time I asked a question, it seemed to throw him off and he kept looking at his mother as if he was afraid of giving the wrong answer.

The mother was screaming and yanking her son. He was sobbing and repeatedly telling his mother that he was sorry.

(Motion, Ex. 22).

Two additional affidavits were submitted from school staff who were in rooms close by - one heard the chair slam against the wall, and both observed the mother screaming at her child and at Ms. Musy. (Exs. 23 & 24).

A third meeting occurred with a hearing officer, Ms. Strange Moscoso, Appellants, their son, and their lawyer. Appellants asked to record this meeting, but that request was denied. They assert that, because they were not allowed to record the conference with the hearing officer, they cannot support their argument that the hearing officer's report contained additions to the discussion or omitted important points. (Appeal at 3). Appellants also asked for witness statements but state that they did not get them timely. (Appeal at 21).

STANDARD OF REVIEW APPLICABLE TO SUSPENSION DECISION

The State Board may reverse or modify a student suspension if the decision of the local board is illegal or if a student's due process rights have been violated. COMAR 13A.01.05.05(G)(3). A decision is illegal if it is, *inter alia*, an abuse of discretion. COMAR 13A.01.05.05(C)(5).

LEGAL ANALYSIS

The local board explains that since the date of its decision in this case, the expulsion has been removed from the student's record as a result of the new legal requirements for school discipline policies in Maryland. (Motion, Ex. 1). Moreover, Appellants' son was transferred, at his parents' request, to a different middle school. (*Id.*). Thus, the only issue before this Board is whether the 10 day suspension was an abuse of discretion or whether the school system violated their son's due process rights.

Was the Ten-day Suspension an Abuse of Discretion?

We have reviewed the facts to determine whether the decision to impose a 10 day suspension constitutes an abuse of discretion. For abuse of discretion to occur in this context, the

decision “has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.” *Atanya C. v. Dorchester County Bd. of Educ.*, MSBE Op. No. 09-26 at 5 (2009); *David J. v. Howard County Bd. of Educ.*, MSBE Op. No. 11-39 at 6 (2011) (citing *State v. WBAL-TV*, 187 Md. App. 135-153 (2009)). In *Atanya C.*, we concluded that harsh punishment does not immediately constitute an abuse of discretion. The local board can look at facts surrounding the student’s conduct and balance those with the school’s “authority and obligation to discipline those students.” *Atanya C.* at 7. Simply put, there is only an abuse of discretion “when the ruling ‘is violative of fact and logic,’ or when it constitutes an ‘untenable judicial act that defies reason and works an injustice.’” *Id.* at 5 (citing *King v. State*, 407 Md. 682, 697 (2009)).

It appears to us that there were mitigation markers in the Appellants’ son’s conduct and record. Prior to this event, Appellants’ son was considered a quiet boy who got very good grades. He was never in trouble in school before. As the hearing officer’s report states:

Ms. Gebhardt provided ██████¹ educational history. ██████ enrolled in MCPS as a Grade 4 student at Bethesda Elementary School, where he remained through Grade 5. Prior to enrolling in MCPS, ██████ attended school in Florida where is (sic) to have had excellent academics and a great attitude and to have been respectful, polite, and kind. In Grade 4, ██████ primarily earned A’s; was above-grade level in mathematics and on-grade level in reading; participated in advanced programs such as “William and Mary,”...In Grade 5, earned all A’s, was advanced in reading and mathematics,....

Currently, ██████ is a Grade 6 student at Westland Middle School. In addition, he is a concert pianist and participates in piano competitions that require him to practice approximately three hours per day. ██████ is enrolled in advanced classes, where he earned a 4.0 Grade Point Average (GPA) in the first quarter, a 3.85 GPA in the second quarter, and a 4.0 GPA in the third quarter....Teacher reports indicate ██████ is a very focused, bright, conscientious student, who excels academically. Additionally, it is noted that ██████ seems to place a lot of pressure on himself and often appears anxious about his grades, even though he scores well on assessments. Finally, ██████ teachers share that he does not socialize much with other students, and although he is tuned in to other students, he does not seem to be close to any of them. ██████ counselor checks in with him daily and he has a flash pass which allows him to see her any time during the school day with no questions asked by his teachers, but ██████ has not used it.

(Motion, Ex. 25 at 4.)

¹ We have redacted the student’s name.

The record also reflects that Appellants' son believed that Student A was a bully to others and was bullying him. His response to her on April 21 was explosive and, for such a quiet boy, difficult to put into perspective absent the belief he had about the bullying.

For the school system, however, the "gravity" of the offense overrode those mitigation markers. (*Id.* at 5). As the Superintendent explained in his decision and memo to the local board, "...the circumstances surrounding the incident show that the incident was very serious and could have resulted in severe injury to another student or to [Appellants' son] himself....The decision was based on the severity and duration of his attack on Student A, the fact that he resisted teachers' effort to intervene...." (Motion, Ex. 32 at 4-5).

Because the local board could not reach a majority vote to affirm or reverse the Superintendent's decision, the Superintendent's decision became the final decision in this case. (Motion, Ex. 34). Given the seriousness of the attack on Student A, and the Superintendent's rationale for the decision and the disciplinary policies in place at the time, we cannot conclude that imposing a ten-day suspension defies reason such that it was an abuse of discretion.

This whole incident was, as the record reflects, an exceedingly traumatic event for this boy. We suggest, therefore, given the differences in school discipline policy today versus at the time this punishment was imposed, that the Superintendent, at his sole discretion, consider the possibility of expungement at some time in the future.

Was There A Due Process Violation?

The State Board may reverse or modify a student's suspension or expulsion if the Appellants show by a preponderance of the evidence that the student's due process rights were violated. COMAR 13A.01.05.05(G)(3). Due process in the school discipline context requires that there be notice of the charges² and an opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Parent H. v. Montgomery County Board of Education*, MSBE Op. No.13-27 (2013).

Between April 21, 2014, when the incident occurred, and May 2, 2014, there were three opportunities to be heard – the Principal Serino meeting; the Coordinator of Pupil Personnel Musy meeting; the Hearing Officer's Conference. Appellants' son became very upset in the Serino meeting; but he did write out his statement and discuss his version of what happened with Serino. The Musy meeting broke off when the mother objected to the way Ms. Musy was questioning her son. To the extent that Appellant was deprived of his "opportunity to be heard" by the abrupt end of the Musy meeting, we note that the conference with the hearing officer was lengthy, and Appellants' son explained his version of events in detail. The report states:

██████ spoke next and said he would like to address some of Ms. Serino's comments first. He said Ms. Serino told him it was an attack, and he would get serious consequences and Student A would not. He said this made him angry because it was unfair that

² Appellants contend that the "shifting" terminology describing their son's offense is a due process violation. Whether it was called "violent" assault or assault does not rise to the level of a failure to provide notice under due process requirements.

he would be punished and Student A would not. We suggested it might be better if ██████ told the incident from his perspective rather than just pointing out what he disagreed with and that is how ██████ proceeded. ██████ said he was in line with his PE class waiting to do the long jump when Student A, who was playing with spray mouth freshener, sprayed it in his eye. ██████ stated he saw Student A do it and afterward she was laughing, holding the bottle and trying to move behind Student B to hide. ██████ said he pushed Student A on the back of her head and she turned to him and made verbal threats. ██████ said Student A said she is much stronger than he is and could easily beat him up. ██████ said she did not respond and Student A tried to kick him, but Student B stopped her and he moved away. A few minutes later when ██████ had moved up about three spaces in the line, he said Student A ran up and kicked him below his knee and the two of them proceeded to struggle and fight with each other. ██████ stated that Student A was not crying when she ran into the open field, but started to cry when she got behind the teacher's back. ██████ believes Student A was crying for sympathy as he says she often does, in order to look like a victim. Because of this, ██████ said he started yelling to the teacher that she should not trust Student A and, subsequently, the teacher took him to the office while someone else took Student A to the nurse. At this point, I asked ██████ if he ever felt out of control during the incident and he said he did not. He added that he never intended to injure Student A, but had been defending himself when Student A hurt him. He expanded on this, mentioning some previous incidents with Student A that had scared him. ██████ concluded by saying he is very sorry for what happened, but Student A hurt him very much and he was very scared when the incident occurred.

(Motion, Ex. 25).

The Appellants also spoke on behalf of their son at this conference and their attorney presented several arguments. (*Id.*) It is our view, looking at the totality of the circumstances, that Appellants' son was not deprived of an opportunity to be heard.

The school system's denial of an opportunity to record the conference(s) does not constitute a deprivation of due process. Whether recordings are allowed remains a local board decision.

Was Discipline Discriminatory?

The Appellant alleges that Student A, who is white, was not disciplined at all, while their son, a minority student, received a harsh punishment. They allege that this represents discriminatory disparate treatment. (Appeal at 22-23).

It is clear from the record that Appellants' son believed that Ms. Serino said Student A would not be disciplined at all. Ms. Serino confirmed in an April 22, 2014 email to the Appellants, however, that she did not say that other students would bear no consequences. (Motion, Ex. 20). In fact, she stated that she could not talk about the discipline of other students "due to privacy." (*Id.*). In short, we do not know whether or not Student A was disciplined.

The State Board has consistently held that an Appellant must support allegations of illegality with factual evidence. See *Ewing v. Cecil County Board of Education*, 6 Op. MSBE 818 (1995); *Stepper v. Board of Education of Anne Arundel County*, 7 Op. MSBE 324 (1996). As the State Board articulated in *Ewing*:

In order to defeat a motion the opposing party must demonstrate that there is a genuine dispute as to a material fact 'by producing factual assertions, under oath, based on personal knowledge.' Unsupported statements or conclusions are insufficient.

Ewing v. Cecil County Board of Education, 6 Op. MSBE at 820; see also *Hurl v. Howard County Board of Education*, 6 MSBE Op. 602 (1993) (mere allegation of discrimination is insufficient to sustain a claim). We, therefore, find that Appellants have not met their burden regarding the claim of discrimination here.

Was the Student Entitled to a Manifestation Hearing?

The Appellants argue that at the time of the April 21 incident, school staff had ample reason to suspect that Appellants' son had a disability related to emotional issues. Thus, they assert that before the imposition of a ten-day suspension or the recommendation of expulsion, their son was entitled to a hearing to determine whether his behavior was a manifestation of his disability. The Individuals with Disabilities Act (IDEA) under certain circumstances does indeed require a manifestation hearing if the school system has knowledge of the child's disability before the behavior that precipitated the disciplinary action occurred. 34 CFR §300.534. Whether Appellants' son was entitled to such a hearing is an issue outside the jurisdiction of this Board, however.

The *IDEA* has created specialized forums for challenging school system decisions concerning a student's rights under *IDEA*. There are three specific processes in place for resolving special education disputes. There is a due process hearing conducted at the Office of Administrative Hearings, the results of which are appealable directly to court. 20 U.S.C. §1415(f); COMAR 13A.05.01.15C. In connection with or in lieu of the due process hearing, there is a mediation process. 20 U.S.C. §1415(e); COMAR 13A.05.01.15(B). There is also a complaint investigation process in place at the Maryland State Department of Education (MSDE). COMAR 13A.05.01.15A.

Given the existence of those specialized forums, the State Board has consistently declined to exercise jurisdiction to resolve special education disputes. See e.g., *Frye v. Montgomery Co. Bd. of Educ.*, MSBE Op. No. 01-30 ("[t]o the extent that the Appellant is contesting the school system's decisions regarding the provision of special education and related

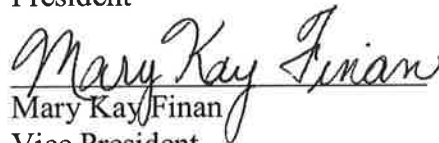
services..., the State Board is not the appropriate forum for redress. The Appellants' remedy is through the due process procedures set forth in IDEA.”)

CONCLUSION

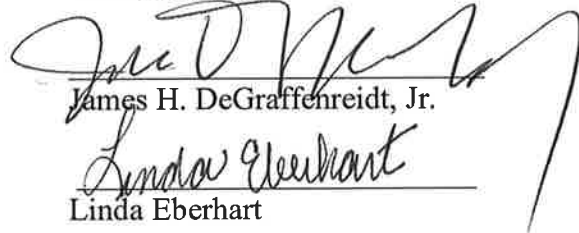
For the reasons stated herein, we affirm the decision of the Superintendent.



Charlene M. Dukes
President



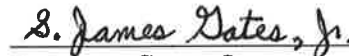
Mary Kay Finan
Vice President



James H. DeGraffenreidt, Jr.



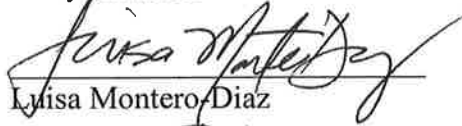
Linda Eberhart



S. James Gates, Jr.



Larry Giammo



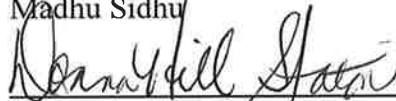
Luisa Montero-Diaz



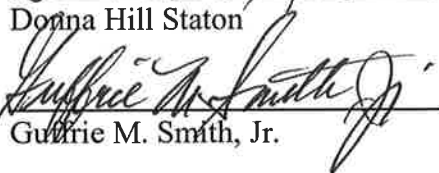
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Madhu Sidhu



Donna Hill Staton



GuDrie M. Smith, Jr.

December 16, 2014